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NO. 94798-8

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE THE DEPENDENCY OF E.H.,

A Minor Child.

R.R.,

Petitioner,

v.

State of Washington,

Respondent.

BRIEF OF *AMICUS CURIAE* WASHINGTON DEFENDER
ASSOCIATION & INCARCERATED PARENTS PROJECT
IN SUPPORT OF PETITIONER

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus curiae is the Washington Defender Association (WDA), a statewide non-profit organization whose membership is comprised of public defender agencies, indigent defenders, and those who are committed to seeking improvements in indigent defense. The WDA is a not-for-profit corporation with 501(c)(3) status. The WDA's objectives and purposes are defined in its bylaws and include: protecting and insuring by rule of law those individual rights guaranteed by the Washington and Federal Constitutions, including the right to counsel, and to resist all efforts made to curtail such rights; promoting, assisting, and encouraging public defense systems to ensure that all accused persons and respondents receive effective assistance of counsel.

Representatives and members of the WDA frequently testify before both houses of the Washington State Legislature on proposed legislation affecting indigent defense issues. The WDA has been granted leave on prior occasions to file amicus briefs in this Court. The WDA represents 30 public defender agencies and has over 1,400 members comprising attorneys, investigators, social workers and paralegals throughout Washington State representing indigent clients in criminal and civil proceedings where their liberty interests are at stake. The WDA's members represent parents and children involved in RCW Title 13 child

welfare proceedings. WDA attorneys have significant expertise on the issues presented in the instant case.

This Court's decision in this case has potentially far-reaching implications to child welfare practice in Washington. The purpose of this brief is to provide the court with information concerning the inequities within Washington's dependency system, including disparate legal outcomes experienced by children of the incarcerated and in particular children of color.

II. ISSUE TO BE ADDRESSED BY AMICUS

1. Whether categorical appointment of legal counsel for children better protects the due process rights of children in Washington's dependency system, where certain legal and well-being outcomes for children differ substantially by race of the child?
2. Whether a parent can adequately protect the child's legal interests, where the parent is incarcerated?

III. STATEMENT OF THE CASE

Amicus adopts the facts as stated in the briefs of petitioner, R.R., and petitioner, S.K.P. The child, E.H., is black, and the child, S.K.P., is multiracial with black heritage.

IV. ARGUMENT

Categorical appointment of legal counsel for all children better protects their due process rights in Washington's dependency system, where certain legal and well-being outcomes for children differ substantially by race of the child. Black and multiracial Black dependent children are more likely to experience less desirable well-being and legal outcomes within the dependency system than White children.¹ Disparate incarceration rates of people of color, particularly Black people, in Washington also produces a disparate and negative impact on dependent Black children in the dependency system. incarcerated parents experience significant barriers to accessing the dependency proceeding preventing them from advocating for their child's interests.

Incarcerated parents face numerous barriers, which prevent them from advocating for their children's legal interests, which include, but are not limited to: delays in appointing parental legal representation at first hearing; being prevented from participating in the dependency case; and being denied frequent and regular child-parent contact and visitation. Even when, as here in E.H., an incarcerated parent overcomes structural

¹ The use of terms referring to racial categories in this brief will be defined in footnotes when the data sources and reports are cited or referenced herein.

barriers to seek counsel on her child's behalf to assert her child's stated legal interest, the current legal framework proves too burdensome to ensure that the child is appointed counsel and the child's stated legal interest is adequately heard and argued before the dependency court.

A. Categorical Appointment of Legal Counsel for All Children Better Protects Their Due Process Rights in Washington's Dependency System, Where Certain Legal and Wellbeing Outcomes for Children Differ Substantially By Race of the Child.

1. Black and Multiracial Black Dependent Children Have Poorer Outcomes Within the Dependency System than White Children.

The racial disparity for black and multiracial black² children in the dependency system begins with the initial report to Child Protective Services (CPS). WASHINGTON STATE RACIAL DISPROPORTIONALITY ADVISORY COMMITTEE (WSRDAC), RACIAL DISPROPORTIONALITY IN WASHINGTON STATE 5 (2008). Black and multiracial black children are almost twice as likely to be reported to Child Protective Services (CPS) as opposed to White children. WSRDAC, *supra*, at 6. Black and multiracial black children are more likely to be removed from home than white children. WSRDAC, *supra*, at 6, 64; DATA MANAGEMENT AND REPORTING

² The term "Black" in this cited report means "if the child had no Indian heritage, but any of the codes indicated Black or African American, the child was coded as Black," so this data set includes multiracial Black children. Washington State Racial Disproportionality Advisory Committee (WSRDAC), *Racial Disproportionality In Washington State* 38 (2008).

SECTION (DMRS), CHILDREN’S ADMINISTRATION, DEPARTMENT OF SOCIAL & HEALTH SERVICES, RACIAL DISPARITY INDICES REPORT 13 (2016). Since the initial studies examining the disparate rate of removal for black and multiracial black children, the Department of Social & Health Services-Children’s Administration (DSHS-CA) has found that some racial disparities still persist.³ DMRS, *supra*, at 13.

Black and multiracial black children remain more likely to be removed from their home within 12 months of CPS investigation. *Id.* When removed from their homes, 93 percent of black children and 84 percent of multiracial black children are placed in out of home placement not with their relatives compared to 77 percent of white children. *Id.* Black and multiracial black children are more likely to be moved twice or more times in the first twelve (12) months in care, and to continue moving more often after two years in care than White children. *Id.*

The most extreme example of placement instability is DSHS-CA’s use of placement exceptions.⁴ Nearly two-thirds (64%) of all dependent

³ As the Department of Social & Health Services Children’s Administration (DSHS-CA) attempts to track racial disparity in the dependency system, it has redefined racial categories; that is, the term Black still includes Hispanics, but does not include other multiracial Black children, both categories still exclude children with Native American heritage. DMRS, *supra*, at 1, 12.

⁴“Placement exceptions” are the use of hotels and Department offices as emergency placements for dependent children placed in the custody of the DSHS-CA and are tracked annually by the Office of Family and Children

children who experienced Washington's placement exceptions in 2016-2017 were from King County alone.⁵ DOWD, PATRICK, OFFICE OF FAMILY AND CHILDREN'S OMBUDS (OFCO), 2017 ANNUAL REPORT 47 (2017). The Office of Family and Children's Ombuds ("OFCO") found that nearly half of the 195 dependent children who experienced placement exceptions were black and multiracial,⁶ even though they accounted for just over a quarter of all Washington's dependent children in out of home placement. DOWD, *supra*, at 52.

Removal from home is profoundly traumatic for children. Christian M. Connell, Jeffrey J. Vanderploeg, Paul Flaspohler, Karol H. Katz, Leon Saunders, and Jacob Kraemer Tebes, *Changes in Placement among Children in Foster Care: A Longitudinal Study of Child and Case Influences*, 80 (3) Soc. Serv. Rev. 398-418 (2006). Data suggests children are more likely to be stable when placed with kin. CHILDREN'S ADMINISTRATION (CA), DEPARTMENT OF SOCIAL HEALTH SERVICES,

Ombuds ("OFCO"). DOWD, PATRICK, OFFICE OF FAMILY AND CHILDREN'S OMBUDS, 2017 ANNUAL REPORT 47 (2017).

⁵ King County is where just over half (51%) of all minor Black children and nearly one-third (31%) of all multiracial children in the entire State of Washington live. KIDS COUNT Data Portal, Under 18 Child Population by Race/Ethnicity (2016). Data were retrieved on June 22, 2017 from: <http://www.ofm.wa.gov/pop/asr/default.asp>.

⁶ The OFCO Annual report did not define the racial categories that were used in this report. It is therefore not known whether the Black children noted here included or excluded Black Hispanics. Dowd, *supra*.

26 (2017). Studies have found that relative and kinship foster care placements are more stable than other types of out-of-home placements. Connell, et al., *supra*, at 398-399. When a child is removed from her or his home or moves to another placement, research suggests that there is a negative impact on that child's developmental trajectories and well-being, including attachment difficulties, externalizing behavioral problems, and internalizing behavioral problems. *Id.*

Educational outcomes for dependent children are also negatively impacted by placement changes, including behavioral problems in school, academic skill delays, and school failure. *Id.* at 399; *See also* Bonnie T. Zima, Regina Bussing, Stephanny Freeman, Xiaowei Yang, Thomas R. Belin, Steven R. Forness, *Behavior Problems, Academic Skill Delays and School Failure among School-Aged Children in Foster Care: Their Relationship to Placement Characteristics*. 9(1) J. Child Fam Stud 87–103 (2000). Moving dependent children multiple times has also been associated with increased levels of mental health service use. Connell, et al., *supra*, at 398-399. When a child is moving each night, she or he is less likely to be having their emotional needs met. DOWD, *supra*, at 52. Multiple changes in any sort of placement may also result in poorer

outcomes for the child and, at sometimes, being placed in costly and restrictive settings, like group care. Connell, et al., *supra*, at 399.

2. Disparate incarceration rates of people of color, particularly black people, in Washington produces a disparate and negative impact on black children in the dependency system.

When it comes to Washington State's criminal justice system, race matters. TASK FORCE ON RACE & THE CRIMINAL JUSTICE SYSTEM, RESEARCH WORKING GROUP, PRELIMINARY REPORT ON RACE AND WASHINGTON'S CRIMINAL JUSTICE SYSTEM 7 (2011). Substantial evidence supports the conclusion that racial iniquities permeate Washington's criminal justice system. *Id.* Numerous studies⁷ confirm

⁷ *Id.* (citing CLAYTON MOSHER, VANCOUVER (WA) POLICE DEPARTMENT, CITIZEN CONTACT DATA ANALYSIS PROJECT: PRELIMINARY REPORT (2003) (finding disparity in warrantless police searches); NICHOLAS LOVRICH, ET AL., DIV. OF GOVT. STUD. & SRVCS, DEPT. OF POL. SCI. & CRIM. JUST., WASHINGTON STATE UNIV., ANALYSIS OF TRAFFIC STOP DATA COLLECTED BY THE WASHINGTON STATE PATROL: PROJECT FINAL REPORT (2005); Katherine Beckett, Kris Nyrop & Lori Pfingst, *Race, Drugs and Policing: Understanding Disparities in Drug Delivery Arrests*, 44 *Criminology* 1, 105-138 (2006) (concluding policing tactics fuels racial disparity in drug delivery arrests); Katherine Beckett, Kris Nyrop, Lori Pfingst & Melissa Bowen, *Drug Use, Drug Possession Arrests, and the Question of Race: Lessons from Seattle*, 52 (3) *Social Problems*, 419-41 (2005)(same); ROBERT D. CRUTCHFIELD, EXHIBIT 2 OF DECLARATION OF ROBERT D. CRUTCHFIELD, PH.D., RACIAL DISPARITY IN THE WASHINGTON STATE CRIMINAL JUSTICE SYSTEM 242-310 (2005) (racial disparity persists in decisions to sentence by imprisonment or confinement) <http://moritzlaw.osu.edu/electionlaw/litigation/documents/exhibitsstatementofmaterialfactspart3.pdf#page=10>).

that disproportionate minority incarceration rates cannot be justified by the hypothesis that minorities commit more crimes. *Id.* Specifically, even after controlling for legally relevant factors, Whites are less likely to be charged with crimes; while Blacks are more likely to have monetary bail requested against them and to receive higher rates of confinement and longer sentences. TASK FORCE ON RACE, *supra*, at 7.

Nationally while nearly half of people incarcerated in state prisons are parents; over three-quarters of people incarcerated in Washington State's prison population are parents. Lauren E. Glaze & Laura M. Maruschak, *Parents in Prison and Their Minor Children* 1 (2008); JOENNE HARRHY AND DEB THIELEN, CHILDREN AND FAMILIES OF INCARCERATED PARENTS ADVISORY COMMITTEE ANNUAL REPORT: REPORT TO THE LEGISLATURE AND GOVERNOR 5 (2010). There is ample evidence that parental incarceration impacts more children in Washington than national studies suggest. HARRHY, ET AL., *supra*, at 5; See ANNIE E. CASEY FOUNDATION, A SHARED SENTENCE 1-2 (2016). Additionally, the experience of parental incarceration for children by race is significantly disparate: 1 in 15 Black children as opposed to 1 in 111 White children. THE SENTENCING PROJECT, INCARCERATED PARENTS AND THEIR CHILDREN: TRENDS 1991-2007 7 (2009)(no data available for multiracial children). Given that black children are already vulnerable to contact

with the dependency system even when their parents are not incarcerated, the difference in impact on dependent Black children whose parents are incarcerated is significant.⁸

A parent's incarceration also impacts children differently depending upon the gender of the parent incarcerated. A child with an incarcerated father is most likely to be living with her or his other parent during his incarceration. Glaze et al, *supra*, at 1 tbl. 8. A child of an incarcerated mother is more likely to be in foster care than a child of an incarcerated father. Glaze, et al., *supra*, at 1. A child with an incarcerated mother is at higher risk than a child with an incarcerated father of losing her or his relationship with her or his incarcerated parent forever.

Charlene Wear Simmons and Emily Danker-Feldman, *Parental Incarceration, Termination of Parental Rights and Adoption* (2010); Steve, Christian, *Children of Incarcerated Parents* 3 (2009). See Center for Research on Child Wellbeing, Princeton University & Columbia Population Research Center, *Fragile Families Research Brief: Parental Incarceration and Child Wellbeing In Families* 3 tbl. 1 (2008).

⁸ WSRDAC found a far higher percent of children (62 percent for Asian children; 88 percent for Black children; 74 percent of White children) in foster care were living in single-parent homes at the time of their out-of-home placement than the general population (25 percent of children in Washington State). WSRDAC, *supra*, at 6.

The rate of relative caregiver placement is also impacted by a racially disparate criminal justice system. *See* Crutchfield (2005), *supra*, at 242-310. In Washington, DSHS-CA chooses to require that all criminal convictions, of prospective relative caregivers be approved by the designee of the DSHS Secretary *prior* to placement, even misdemeanors and charged that are not related to the care of children.⁹ *See* RCW 74.15.030(2), (3); WAC § 388-06A-0190 (1)(b),(2); WAC § 388-06A-0170; WAC§ 388-06A-0180; WAC §388-06A-0190.

This barrier operates in a nuanced way in practice. When the juvenile court directly orders the child placed with relatives, the child can be placed with relatives before the administrative approval is completed.¹⁰ But, when the juvenile court defers to DSHS-CA by giving it *the authority to place* a child with her or his relatives, then prior administrative approval is required.

B. Incarcerated Parents Face Significant and Numerous Barriers to Accessing the Dependency Proceeding Preventing Them From Advocating for Their Child's Legal Interests.

⁹ The federal Adam Walsh Act of 2006 requires States to create a fingerprint background check approval procedure for all persons who will be unsupervised with children, but that law does not disqualifies applicants based on a smaller list of felony crimes. 42 USC § 671 (15)(D).

¹⁰ The juvenile court may consider the criminal history as part of its decision, but it is not restrained from ordering placement.

Because children and with incarcerated parents do not receive frequent and regular contact and visitation, their parents are disadvantaged when it comes to determining if and when their child has legal needs. CA (2017), *supra*, at 31. Other communication (like cards, letters and telephone and video calls) between incarcerated parents and their children is not under the parents' control and revolves instead around public policies, administrative regulations, and staff practices.¹¹ Creasie F. Hairston, *Kinship Care When Parents are Incarcerated*, 20-21 (2009); See RCW 13.34.136 (2)(b)(ii)(A). Staying informed is very difficult for parents who are incarcerated. *Id.* at 36.

Visitation is difficult to enforce. Washington courts have repeatedly declined to impose a duty upon the DSHS-CA to provide child-parent visitation. *In re M.J.*, 187 Wn. App. 399, 411, 348 P.3d 1265, 1271 (2015) (upholding suspension of visits based on finding that exposing child to jail or prison setting is not in the child's best interests); *Matter of K.M.M.*, 186 Wn.2d 466, 484, 379 P.3d 75 (2016)(holding DSHS has no duty to provide therapeutic relationship services to repair child-parent separation or damage, if doing so is futile); *Matter of B.P. v. H.O.*, 186 Wn.2d 292, 298, 376 P.3d 350 (2016)(same). Without visits and contact

¹¹ Calls can be by telephone or by video, but both methods are provided by private corporate contract vendors at local, county, and state correctional sites.

with their children, incarcerated parents are disadvantaged to identify and their child's legal interests to the dependency court.

Although incarcerated parents are entitled to be represented at all proceedings, and if indigent to receive counsel at public expense at every stage of the proceedings, including the first shelter care hearing, these appointments are often delayed. RCW 13.34.090(1); RCW 13.34.090(2); *see* JuCR 9.2 (c)(2). Prompt appointment of parental legal counsel for incarcerated parents does not occur in every county at the first (shelter care) hearing.¹² Legal counsel for the child at that first hearing can litigate legal issues that directly improve the child's level developmental trajectory. *Id.* at 3 (the earlier the child's attorney is assigned, the more likely the child will be living with a parent, or someone she or he previously knew). Thus, delays in appointment affect a parent's ability to protect the child's legal interests, and that ability varies county by county.

Incarcerated parents must rely upon third parties to relay information *about* their children. Incarcerated parents, even if they have legal counsel, have a limited number of opportunities to learn about,

¹²As of July 1, 2018, attorneys providing parental legal representation contract with the Washington State Office of Public Defense Parents Representation Program (OPD-PRP) to provide the legal services in all of Washington's 39 counties. An informal survey of OPD-PRP contractors revealed that less than eight of the responding 22 counties automatically appoint counsel to parents known to be incarcerated at the first hearing.

understand, and anticipate their child's legal needs, particularly if they are not permitted to attend court hearings or case conferences, or DSHS-CA led case planning meetings. This lack of access makes it difficult for incarcerated parents to know when their child has legal needs and whether those legal needs are being considered.

Whether incarcerated parents are permitted to attend their dependency hearings is a discretionary decision of the juvenile court and varies by county. *See Whitney v. Buckner*, 107 Wn.2d 861, 865 (1987) (prisoners have a substantive due process right to access the courts); *Bounds v. Smith*, 430 U.S. 817, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977); *see also In the Interest of Darrow*, 32 Wn.App. 803, 807-08 (1982) (prisoners have a substantive due process right to access the courts). Incarcerated parents also face barriers in participating in their out-of-court dependency meetings.¹³ DSHS-CA hosts these meetings to make plans with, about, and for the family they are serving. RCW 13.34.136 (2)(b)(i)(A) (case planning for incarcerated parents); RCW 13.34.067(3)(case conferences for incarcerated parents); CA (2017), *supra*, at 40, 42.

Taken together, these barriers -delays in appointing parental legal representation; denial, delay, or diminished amount of parent child

¹³ DSHS-CA, Practice & Procedures Guide, Policy 1720 (Family Team Decision Making Meetings).<https://www.dshs.wa.gov/ca/1700-case-staffings/1720-family-team-decision-making-meetings> (last visited February 1, 2018).

visitation; and little to no involvement in dependency court hearings and planning meetings about the family- result in severe disadvantage to incarcerated parents when determining if their child has legal needs for which they must request representation. CA (2017), *supra*, at 40. Black and multiracial dependent children in Washington State, like E.H., who have an incarcerated parent, are a higher risk of losing their parent child relationship.¹⁴ In this way, the timing of legal representation for the child and the court's resulting orders about the child's placement and child's visitation are inextricably linked with the child's stated interest and the legal outcomes of the case. The litigation required to achieve this type of outcome happens during the dependency proceeding, not the termination proceeding.¹⁵

V. CONCLUSION

Even when an incarcerated mother, like R.R. overcomes structural barriers to seek legal representation on her child's behalf, the current legal

¹⁴ Family reunification for dependent children with their incarcerated parents remains elusive. Matter of E.D., 195 Wn.App. 673, 690, 381 P.3d 1230 (2016); see 42 USC § 671 (15)(D); see also Arlene Lee, Philip M. Genty, and Mimi Laver, *The Impact of the Adoption and Safe Families Act on Children of Incarcerated Parents* (2005).

¹⁵ Merely supplanting a plan of guardianship for reunification upon an incarcerated parent's release does not adequately protect the child's legal interest, and is not a replacement for zealous advocacy a child advocate representing a different viewpoint, of the child.

framework proves too burdensome to ensure child's *stated* legal interest is fully and fairly litigated before the court. Thus, categorical appointment of legal counsel to all children in Washington's dependency system is necessary.

Respectfully submitted this 2nd day of February, 2018.



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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that the following is true and correct to the best of my knowledge and true belief:

On February 2, 2018, I electronically filed the Motion for Leave to File *Amicus Curiae* Brief, adn the Brief of *Amicus Curiae* (Washington Defender Association & Incarcerated Parents Project) using the Washington State Appellate Courts' E-Filing Portal, which will serve the document on Assistant Attorney General, Kelly Taylor, and all other registered parties of record.



WSBA No 32207

On Behalf of Attorneys for Amicus Curiae Brief (WDA)

WASHINGTON DEFENDER ASSOCIATION &
WDA's INCARCERATED PARENTS PROJECT

WASHINGTON DEFENDER ASSOCIATION

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